

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3414 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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INDIAN HUME PIPE COMPANY LTD

Versus

UNION OF INDIA THRO' LEGAL ADVISER K C D GANGWANI

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Appearance:

MR P RAMASWAMY WITH MR RM DESAI for Petitioner  
MS JD AJMERA for Respondent No. 1 and 2

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 17/12/96

ORAL JUDGEMENT

1. The petitioner by this petition is challenging the order annexure 'S' dated 28th March, 1984 passed by the first respondent under sec.19-A of the Employees' Provident Fund & Miscellaneous Provisions Act, 1952 (hereinafter referred to as the Act, 1952).

2. The facts, in brief, of the case are that the

petitioner is a Public Limited Company incorporated under the Companies Act, 1956 having its registered office at Construction House, Walchand Hirachand Marg, Ballard Estate, Bombay. The petitioner is engaged in manufacture and sale of cement concrete pipes, known as Hume Pipes and allied products such as R.C.C. Poles, Prestressed Concrete Pipes, R.C.C. Water tanks, Septic Tanks etc.. The petitioner is also engaged in the manufacture and sale of Hume steel Pipes, Hume Steel Specials and Penstock Pipes for Hydro Electric Projects. The present writ petition relates to a Work-site situated at Surat where the petitioner had undertaken laying works for Surat Municipal Corporation, Surat. The petitioner's registered office is a "commercial establishment" as defined under The Bombay Shops and Establishment Act. The petitioner owns 46 factories situated all over India which came into existence at different periods. The petitioner established a factory at Surat in the year 1940 mainly for the manufacture of cement concrete pipes and allied products. The said factory was an independent unit for all purposes and being a new establishment it was given a separate code number being Code No.GJ-80 by the Provident Fund Authorities. The factory was permanently closed down in August, 1973. On the closure of the said factory the workmen who were working therein were retrenched and they were paid due compensation. On the closure of the said factory at Surat, the petitioner by its letter No.SUT/482/37 dated 7-1-1974 informed the Regional Provident Fund Commissioner, Gujarat, that the said factory at Surat had been permanently closed and the petitioner had given intimation of the closure of the said factory from 10-8-1973 to the Chief Inspector of Factories also. The Regional Provident Fund Commissioner was also informed that there were no employees working at the said factory and all the Returns upto 31-12-1973 had been submitted to the Commissioner and that no further Returns would be submitted. The request has also been made by the petitioner to the Regional Provident Fund Commissioner, Gujarat to cancel the code number given to the said factory. The petitioner requested the Regional Provident Fund Commissioner to settle the accounts of the employees of the said Surat factory who were members of the Provident Fund. All plant and machinery items of the said factory were dismantled and sold in the year 1973.

3. In response to the advertisement of the Surat Municipal Corporation, the petitioner submitted its Tender for the manufacture, supply etc. of Hume Steel Pipes. The advertisement was in respect of laying of 1200 Hume Steel Pipe line from Railway culvert to Ayurvedic Hospital near Hope Circle sub-station and also

for laying pipes from Ayurvedic Hospital to Athava lines. As per agreement dated 26-4-1978, entered into between the petitioner and Surat Municipal Corporation, Surat, the petitioner was granted the job of laying 1200 mm Pipe line from Railway culvert to Ayurvedic Hospital. Another agreement dated 2-5-1978 was also entered into between the petitioner and Surat Municipal Corporation for manufacture, transport, supply and laying, testing and commissioning of Hume steel water supply pipe line at Surat. In the year 1977, the petitioner proposed to establish a new factory for manufacture of Hume Steel Pipes at Surat, but the permission was not granted as well as further electric power was also not available. Hence, the idea to establish a new Hume Steel Pipe factory at Surat had to be given up by the petitioner. It was proposed for the reason that at the time in 1977 also the petitioner had some contract with the Surat Municipal Corporation. The petitioner got the required hume steel pipes manufactured at its existing factory at Wadala, in Bombay. The Wadala factory had and has been covered by the Provident Fund Act from the year 1952. The petitioner in order to supervise the laying work which was the main part of the contract undertaken by it from the Surat Municipal Corporation established a site office at the old factory site which was closed down in the year 1973. It was purely a laying site office and not factory. The site was not used for manufacturing process. The petitioner had engaged a separate agency for laying works and as such the petitioner was only supervising the laying of the pipes. In fact, the work was being supervised and controlled by the Engineers of Surat Municipal Corporation itself. The work of laying of pipes consisted of excavation, laying, welding at joints, filling up, etc. This work was being supervised by three employees of the petitioner who were the members of the Company's Provident Fund Scheme viz. the Construction Employees' Provident Fund Scheme, Bombay.

4. The Provident Fund Inspector on 7-11-1978 visited the laying site office of the petitioner at Surat and submitted its report in which it has been reported that the factory at Surat was restarted from October, 1977 and the employees set out in the said report had qualified for E.P.F. membership from the dates shown against their names and asked the factory to make payment in respect of the said employees. The Regional Provident Fund Commissioner, Gujarat vide showcause notice dated 28th November, 1978 called upon the petitioner to explain as to why it did not remit provident funds, family pension funds contributions and insurance funds contributions as required in respect of 8 employees whose enrolment was

required to be done as pointed out by the Provident Fund Inspector in its inspection report of 7th November, 1978, and further it has been stated that the petitioner had committed an offence under sec.14 and 14A of the Act, 1952. The petitioner has come up with a case that out of 11 employees, two were already the members of the Contribution Employees Provident Fund Scheme, Bombay and one more member was also the member of the said scheme and 8 employees were qualified for membership whose names have been shown in the report of the Inspector. Notice for penal damages has also been issued to the petitioner under sec.14-B. Under its letter dated 14th December, 1978 the petitioner has given out that it would be paying the provident fund dues in respect of the new members and that it would also file Returns as required, retrospectively. Under the letter dated 28th December, 1978, the petitioner stated that it has already paid Rs.2,435.55ps. towards contribution to the provident fund from December, 1977 to November, 1978 as stated therein and submitted Returns also for the members.

5. The Provident Fund Commissioner issued another notice to the petitioner dated 24th March, 1979 and in reply to the same, the petitioner has come up with a defence that it is not restarted the factory at Surat. It has also been contended that the laying work at Surat was not covered under the provisions of the Act, 1952 and no contributions were payable and further the laying work did not amount to restarting of the factory. This very defence has been reiterated by the petitioner under its letter dated 2nd June, 1979. The further explanation has been given that under misconception of law the payment earlier has been made towards the contribution of the Provident Fund and other heads. The petitioner desires that present is a fit case to be referred to the Central Provident Fund Commissioner under sec.19-A of the Act, 1952 for the determination of the question of applicability of the provisions to the petitioner at Surat. Further correspondence were there between the petitioner and the Regional Provident Fund Commissioner, Gujarat.

6. The Regional Provident Fund Commissioner under its order dated 15th October, 1982 held that the agreements dated 26-4-1978 and 2-5-1978 makes it clear that the petitioner had undertaken the work of manufacturing, transporting, laying and commissioning of 1200 mm dia. H.S. Pipeline for Surat Municipal Corporation. It has further been held that "Manufacture" and/or "Manufacturing process" as defined under the Act, 1952 and "Employee" as defined under the said Act, should

be taken together and as such the work undertaken by the petitioner was one single comprehensive and laying works was one of the activities for which the contract had been taken. So the notice under sec.7A of the Act, 1952 was held to be legal and proper.

7. The petitioner had challenged that order of the Regional Provident Fund Commissioner before this court by filing Special Civil Application No.2175 of 1983 which came to be disposed of on 1-8-1983. The petitioner had withdrawn that petition with a liberty to approach to the Central Government under sec.19-A of the Act, 1952. The petitioner filed an application before the Central Government under sec. 19-A of the Act, 1952, which came to be dismissed under the order dated 28th March, 1984. Hence, this Special Civil Application.

8. Reply to the Special Civil Application has been filed by the respondent. Further affidavit has been filed by the petitioner.

9. One of the contentions raised by the learned counsel for the petitioner is that whether the order made by the Regional Provident Fund Commissioner, Gujarat in a proceeding initiated on a showcause notice to the petitioner treating it to be a case of restart of factory by it at Surat were legal proceedings when before the Central Government, the respondent-Regional Provident Fund Commissioner, Gujarat specifically given up the plea of restart of the factory at Surat. In addition to the aforesaid submission, the learned counsel for the petitioner made other contentions also challenging the validity of the orders made by both the authorities, but I do not consider it appropriate to advert to all other contentions as what I feel is that this matter deserves to be remanded back to the Central Government for consideration of the legal issue raised by the counsel for the petitioner.

10. Shri J.D. Ajmera, learned counsel for the respondent, on the other hand, contended that this point was not raised by the petitioner before the Regional Provident Fund Commissioner or before the Central Government. In the writ petition, proceedings under Article 226 of the Constitution, the petitioner should not be permitted to raise a new plea. It has next been contended by Shri Ajmera, the counsel for the respondent that the notice has been given to the petitioner and the liability for the payment of the contribution of the Provident fund and contribution of other funds has been held to be of the petitioner and as such, this notice

given to the petitioner treating it to be a case of restart of factory at Surat is of no substance whatsoever.

11. I have given my thoughtful consideration to the submissions made by learned counsel for both the parties. It is not in dispute between the parties that the Regional Provident Fund Commissioner, Gujarat has given the showcause notice to the petitioner treating it to be a case of restart of factory at Surat which was closed in the year 1973. It is also not in dispute that the factory at Surat of the petitioner was given a separate code number. The Regional Provident Fund Commissioner has given the notice for payment of the amount of provident fund as well as the amount of other funds under the Act, 1952 to the petitioner taking it to be a case of restart of factory at Surat which was already covered under the Act, 1952. Before the Regional Provident Fund Commissioner this point was not available to the petitioner as at that stage, the authority proceeded on the basis of showcause notice that it is a case of restart of factory at Surat by the petitioner. In the proceedings before the Central Government, under sec.19-A of the Act, 1952, the representative of Regional Provident Fund Commissioner, Gujarat, had specifically given up the plea of restart of the unit factory at Surat. This position is also not in dispute between the parties. Reference may have to the decision of the Central Government under sec.19-A of the Act, 1952, wherein it is specifically mentioned "at the time of hearing, the plea of the department that the unit was restarted was given up". A somersault has been taken by the respondent before the authority under sec.19-A and a case has been made out that the establishment at Bombay which is a covered establishment carried out these activities, as per the agreement partly at Wadala and partly at Surat and therefore all the employees who are connected with the execution of the said agreements were to be covered and those who are not covered should be brought within the ambit of the Act and the Scheme in terms of the provisions of the Act and the Scheme. The authority under sec.19-A of the Act, 1952, formulated the point for consideration as under:

"Whether M/s. Hume Pipe Co. a public limited, with its head office in Bombay and factories scattered all over India, is liable under the aforesaid Act and the Scheme for its employees engaged in various activities at Surat."

12. The question which is raised by the counsel for

the petitioner is purely a question of law which may go to the root of the case. There is no dispute on the facts and as such, though the plea raised is a new plea, it can be permitted to be raised by the petitioner in a proceeding under Article 226 of the Constitution of India. In the case of Shri Rattanlal Sharma vs. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School & Ors. reported in JT 1993 (3) SC 487, the Apex court has decided that in what cases and under what circumstances, a new plea can be permitted to raise first time in the proceeding under Article 226 of the Constitution. I cannot do better than to refer the relevant portion of the decision of the Hon'ble Supreme Court aforesaid which is reproduced as under:

Generally a point not raised before the tribunal or administrative authorities may not be allowed to be raised for the first time in the writ proceeding, more so when the interference in the writ jurisdiction which is equitable and discretionary is not of course or must as indicated by this Court in A.M. Allison vs. State of Assam (AIR 1957 SC 227) particularly when the plea sought to be raised for the first time in a Writ proceeding requires investigation of facts. But if the plea though not specifically raised before the subordinate tribunals or the administrative and quasi-judicial bodies, is raised before the High Court in the writ proceeding for the first time and the plea goes to the root of the question and is based on admitted and uncontroverted facts and does not require any further investigation into a question of fact, the High Court is not only justified in entertaining the plea but in the anxiety to do justice which is the paramount consideration of the Court, it is only desirable that a litigant should not be shut out from raising such plea which goes to the root of the lis involved. The aforesaid view has been taken by this Court in a number of decisions and a reference may be made to the decisions in A.S. Arunachalam Pillai v. M/s. Southern Roadways Ltd. and another (1960 AIR SC 1191), The Cantonment Board, Ambalal v. Pyarelal (1963 (3) SCR 341).

It is a jurisdiction issue which is sought to be raised by the petitioner and in case ultimately authority held that on the notice issued by the authority at Gujarat, the order could have been passed then whole of the

proceedings will go. The establishment of the petitioner is covered under the Act, 1952, but it is at Bombay. Wadala is also in Bombay. The coverage has been given to the employees working at Surat by the Regional Provident Fund Commissioner at Gujarat treating them to be the employees of the establishment or the factory at the place situated other than the place in the State of Gujarat. So this jurisdictional issue has to be considered by the authority under sec.19-A of the Act, 1952. I do not consider it appropriate to decide this issue here as it is always better to have first the opinion of the authority under sec.19-A of the Act, 1952.

13. Taking into consideration the totality of the facts of this case, this writ petition succeeds in part. The order of respondent no.1 dated 28th March, 1984, annexure 'S' is quashed and set aside and the matter is remanded back to the said authority with the direction to decide the question which has been raised by the petitioner before this court on merits. However, it shall be open to the parties to make further submissions on the points which have been decided by the authority under sec.19-A of the Act, 1952. The respondent no.1 is further directed to decide the matter afresh and not only on the point which is directed in this judgment to be decided by it. Rule is made absolute in the aforesaid terms with no order as to costs.

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